S.B. Civil Writ Petition No.4770/2007
Surendra Panwar
vs
ADJ (FT) No.4 & Anr.

Date of order : 21.11.2007

HON'BLE MR. PRAKASH TATIA, J.

Mr.SS Rajpurohit, for the petitioner.
Mr.Mahendra Prajapat, for the respondent.

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Heard learned counsel for the parties.

The petitioner is aggrieved against the grant of unconditional leave to defend which was granted to the defendant-respondent by the trial court in a suit filed by the petitioner-plaintiff under Order 37 CPC.

According to learned counsel for the petitioner, the petitioner entered into an agreement for purchase of the plot no.52 from the defendant-respondent and paid Rs.2,77,000/- to the defendant-respondent. The defendant-respondent in written agreement disclosed that the property in dispute was never sold to anybody nor it was mortgaged nor any charge was created and the property is neat and clean. In the agreement the defendant agreed that in case, there will be any dispute then he will refund Rs.2,77,000/- alongwith interest to plaintiff and the plaintiff shall have right to recover the amount from personal property of the defendant. Some other persons started raising construction over the said plot no.52

upon which the plaintiff came to know that there is a dispute about the plot and plaintiff raised objection before the defendant for signing a wrong agreement and obtaining rupees from the plaintiff. It is also submitted that plaintiff came to know that some suit is already pending with respect to plot no.52 that defendant agreed to sell to the plaintiff. In view of the above reasons, the plaintiff filed the suit for recovery of Rs.2,77,000/- on the basis of the agreement dated 7th Oct., 2003. The plaintiff submitted two applications, one under Order 7 Rule 11 CPC and another for grant of leave to defend. In the applications, defendant submitted that the suit filed by the plaintiff under Order 37 CPC is not maintainable as it was suit for refund of the amount as well as for interest as damages. The suit,therefore, is not of nature for which proceedings can be initiated under Section 37 CPC. It is also submitted in application for leave to defend that the agreement is not registered and how the plot no.52 has gone out from the hands of the defendant or plaintiff is not mentioned in the suit. The plaintiff has not impleaded the owner of the plot no.52 as party. The defendant further submitted that he did not enter into agreement for sale of the property nor he received any money in pursuance of the said agreement. The trial court granted leave

to defend.

Petitioner-plaintiff's first objection is that written arguments and the judgments cited were not considered by the trial court. The counsel for the petitioner on merits submitted that it is settled law that leave cannot be granted on the basis of frivolous or vexatious or illusory defence. Learned counsel for the petitioner also wants to rely upon the same judgments which were referred by the petitioner in the written arguments submitted before the trial court.

I considered the submissions of learned counsel for the petitioner. So far as reference of the judgments are concerned, there was no need in the facts of the case because of the reason that there is no dispute with legal proposition as held in above judgments and the trial court considered the case on facts and found the case worth granting leave to defend the suit, that too, unconditionally. So far as judgments cited and relied upon by learned counsel for the petitioner are concerned, there cannot be any dispute that no relief can be granted on frivolous, vexatious or illusory defence raised by the defendant in the suit filed under Order 37CPC. But in the present case, in view of the facts mentioned above it appears that the suit of the plaintiff is based on any agreement to sell of the immovable property and

the claim of the plaintiff is of breach of contract by the defendant and on the basis of which, the plaintiff prayed for refund of the money from the defendant. Substantially it appears to be a suit not only for refund of money on the basis of agreement because of the reason that the refund of money by the defendant depends upon certain facts to be proved by the plaintiff and that substantially either of breach of contract or non-compliance of the terms of the agreement by the defendant. In the plaint itself plaintiff has disclosed some other persons also involved in the dispute as they were raising construction over the plot. On the basis of that act of other persons, the defendant reached to the conclusion that defendant will not be able to transfer the title of property to plaintiff and, therefore, is entitled to refund of money.

In view of the defence raised by the defendant, it cannot be said that the defences are frivolous or only moon sign or are vexatious, therefore, this Court is not inclined to interfere in the impugned order granting leave to defend to the defendant unconditionally. However, it is made clear that none of the observations made in this order be construed on merit in favour of or against any of the party because matter under consideration before this Court was only that whether the court below was justified

in granting leave to defend and whether the defences are only vexatious and frivolous. Whatever defences may be raised by the defendant in the written statement, the defendant shall have to prove those defences in accordance with law.

In view of the above reason, I do not find any merit in the writ petition. Hence, the writ petition of the petitioner is dismissed and the stay order granted by this Court on 9.8.2007 is vacated and the stay petition is also dismissed. In view of the final decision of this writ petition, the trial court may proceed to decide the application filed by the petitioner under Order 38(5) CPC.

(PRAKASH TATIA), J.

c.p.goyal/-